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**Daufuskie Club, Inc. d/b/a Daufuskie Island Club and Resort, Inc. and Melrose Asset Corp., Bloody Point Asset Corp., and Melrose Landing Corp. and Club Financial Corp. and Club Corporation Inc., and its wholly owned subsidiaries Clubcorp International, Inc., Clubcorp USA Inc., Club Corporate, Inc., Clubcorp of America, Inc. and Clubcorp Resorts, Inc., d/b/a The Pinehurst Company and/or Pinehurst Company Resorts and/or Pinehurst, Inc. and Tiburon Capital Group and Tiburon Hospitality Management, LLC and their wholly owned subsidiaries and/or affiliates Daufuskie Island Properties, LLC, Carolina Shores, LLC, Melrose Utility Company, Inc., and Rose Mix, Inc. and International Union of Operating Engineers, Local 465, AFL-CIO. Case 11-CA-17334**

April 16, 2004

#### SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On May 14, 1999, the National Labor Relations Board issued a Decision and Order in this proceeding<sup>1</sup> in which it ordered Respondent Daufuskie Club, Inc., to make whole 108 named discriminatees for their losses resulting from Respondent Daufuskie's unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. On May 2, 2000, the United States Court of Appeals for the District of Columbia Circuit entered an unpublished judgment enforcing the Board's Order.<sup>2</sup> On about May 31, 2002, Respondent Daufuskie was sold to Respondent Tiburon Hospitality Group, et al. (Respondent Tiburon).

A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Regional Director for Region 11 issued a compliance specification and notice of hearing on August 12, 2002, alleging that Respondent Tiburon is a successor of Respondent Daufuskie and that they are jointly and severally liable for the amounts of backpay owed to the individual discriminatees that are set forth in that document.<sup>3</sup>

<sup>1</sup> 328 NLRB 415.

<sup>2</sup> 221 F.3d 196.

<sup>3</sup> The compliance specification identifies Respondent Daufuskie as Daufuskie Club, Inc. d/b/a Daufuskie Island Club and Resort, Inc.; Melrose Asset Corp.; Bloody Point Asset Corp.; and Melrose Landing Corp.; Club Financial Corp.; Club Corporation Inc., and its wholly owned subsidiaries Clubcorp International, Inc., Clubcorp USA, Inc.,

The compliance specification also notified both Respondents that they were required to file a timely answer complying with the Board's Rules and Regulations. On August 30, 2002, Respondent Daufuskie filed an answer. Respondent Tiburon failed to file an answer to the compliance specification.

By letter dated September 5, 2002, the General Counsel advised Respondent Daufuskie that portions of its answer were insufficient under Section 102.56(b) of the Board's Rules and Regulations in that those portions failed to plead specifically as to information within Respondent Daufuskie's knowledge. On the same day, the General Counsel advised Respondent Tiburon by letter that it had failed to file an answer.

On September 13, 2002, Respondent Tiburon filed an answer to the compliance specification and notice of hearing. Respondent Tiburon generally denied the contested paragraphs. The answer claimed insufficient information on which to admit or deny the allegations concerning gross backpay and interim earnings. The answer also denied that Respondent Tiburon was a successor to Respondent Daufuskie.

Also on September 13, 2002, Respondent Daufuskie filed a supplemental answer denying, among other things, that the average hourly earnings formula utilized in the compliance specification was appropriate. Rather, it contended that the appropriate backpay formula is "Formula Two," referenced in Section 10532.3 of the Board's Casehandling Manual, which provides for the calculation of gross backpay based on the hours and wages of comparable employees. Respondent Daufuskie, however, did not supply supporting figures and made no calculations.

On October 4, 2002, the General Counsel filed with the Board by Federal Express a Motion for Partial Summary Judgment.<sup>4</sup> The General Counsel asserted in that

Club Corporate, Inc., Clubcorp of America, Inc.; and Clubcorp Resorts, Inc., d/b/a The Pinehurst Company and/or Pinehurst Company Resorts and/or Pinehurst, Inc.; and Respondent Tiburon as Tiburon Capital Group and Tiburon Hospitality Management, LLC and their wholly owned subsidiaries and/or affiliates Daufuskie Island Properties, LLC, Carolina Shores, LLC, Melrose Utility Company, Inc., and Rose Mix, Inc.

<sup>4</sup> On October 5, 2002, that motion was served on representatives of the parties by certified mail, and on the parties by regular mail. Inasmuch as the parties were not served in the same manner as was used for filing with the Board, the Motion for Partial Summary Judgment had not been properly served in accordance with Sec. 102.114 of the Board's Rules and Regulations. On October 8, 2002, the Regional Director indefinitely postponed the hearing in this manner.

On October 15, 2002, the General Counsel filed a motion that the Board accepts the Motion for Partial Summary Judgment. The General Counsel contended that inasmuch as the parties were now properly served and the hearing had been postponed, the Respondents could show no prejudice by the Board's acceptance of the Motion for Partial

motion that inasmuch as Respondent Daufuskie's supplemental answer did not contain "appropriate supporting figures," it was nothing more than a general denial of the General Counsel's backpay formula. The General Counsel's motion further contended that the Respondents' separate answers to paragraphs 9(a), (b), (c), (d), and (e), 10, 11, 13(a) and (b), 14(a) and (b), 15, 16, 17, and 18 of the compliance specification failed to meet the requirements of Section 102.56 (b) and (c) of the Board's Rules and Regulations because they constituted general denials of matters within each of the Respondent's knowledge. The General Counsel moved that the Board deem paragraphs 9(a), (b), (c), (d), and (e), 10, 11, 13(a) and (b), 14(a) and (b), 15, 16, 17, and 18 of the compliance specification to be admitted as true and grant the General Counsel's Motion for Partial Summary Judgment.

On October 9, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted.

On October 23, 2002, Respondent Daufuskie filed an opposition to the General Counsel's Motion for Partial Summary Judgment and Reply to Board's Notice to Show Cause, to which it attached its second supplemental and amended answer. In this opposition, Respondent Daufuskie maintained that it was prejudiced by the improper service of the General Counsel's Motion for Partial Summary Judgment because it was deprived of the opportunity to respond to that motion prior to the Board issuing its Show Cause Order, resulting in the postponement of the hearing. Respondent Daufuskie further contended that its second supplemental and amended answer cured any defects in its first supplemental answer, but that the first supplemental answer was also sufficient to avoid summary judgment. Accordingly, it requested that the Motion for Partial Summary Judgment be denied pursuant to Section 102.114(c)(1) of the Board's Rules and Regulations.

The General Counsel did not file a response to Respondent Daufuskie's opposition to the Motion for Summary Judgment or Respondent Daufuskie's second supplemental and amended answer.

#### Ruling on the Motion for Partial Summary Judgment

Sections 102.56(b) and (c) of the Board's Rules and Regulations state:

(b) Contents of answer to specification. —The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless

the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) Effect of failure to answer or plead specifically and in detail to backpay allegations of specification. —If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing evidence supporting the allegation.

In its first supplemental answer to the compliance specification, Respondent Daufuskie generally denied the allegations of the specification, invoked a different backpay formula, and asserted that the relevant payroll records necessary to make the required calculations were not in its possession. The General Counsel filed his Motion for Partial Summary Judgment based on the first supplemental answer to the compliance specification.

It is well established, however, that a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a Notice to Show Cause. *MFP Fire Protection*, 337 NLRB 984, 985 (2002); *Mining Specialist, Inc.*, 330 NLRB 99, 101 fn. 12 (1999). We find that the second supplemental and amended answer cured any defects in the first supplemental answer and complies with the requirements of the Board's Rules and Regulations be-

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Summary Judgment. The General Counsel requested that the Board accept the Motion for Partial Summary Judgment and afford the Respondents a reasonable opportunity to respond to the motion.

cause it adequately states the basis for disagreeing with the compliance specification allegations, sets forth in detail Respondent Daufuskie's position as to the applicable formula, and furnishes the appropriate supporting data. Further, Respondent Daufuskie's general denial of interim earnings in its various answers is sufficient to defeat a Motion for Summary Judgment as to those earnings, as they are generally not within its knowledge. *Dews Construction Corp.*, 246 NLRB 945, 947 (1979).

Respondent Daufuskie's second supplemental and amended answer contends that the average hourly earnings approach used in the compliance specification grossly overstates the quarterly baseline earnings for the discriminatees throughout the backpay period. Instead, Respondent Daufuskie proposes an "actual earnings" approach for calculating quarterly baseline gross backpay earnings, utilizing the actual 1996 W-2 earnings record of the discriminatees. Respondent Daufuskie provides supporting data for its gross backpay calculations, interim earnings presently known by Respondent Daufuskie, backpay tolling dates, the predecessor's wage rate, the W-2 wages, severance pay, and the specific formulas upon which the calculations were based for each discriminatee. The General Counsel has not contested the sufficiency of Respondent Daufuskie's second supplemental and amended answer. Accordingly, because the second supplemental and amended answer is sufficiently specific under the Board's Rules and Regulations to join the issues raised by the compliance specification, we shall deny the General Counsel's Motion for Partial Summary Judgment with respect to Respondent Daufuskie.<sup>5</sup>

With respect to Respondent Tiburon, its denial in its answer that it was a successor to Respondent Daufuskie raises an issue must be resolved at a hearing. See *Marine Machine Works*, 256 NLRB 15, 17 (1981). We need not decide the question of the adequacy of Respondent Tiburon's answer to the gross backpay allegations of the specification. Respondent Daufuskie's answer ade-

quately raises the gross backpay issue. Respondent Tiburon, if found to be a successor, would be derivatively liable therefore. Cf. *Kolin Plumbing Corp.*, 337 NLRB 234, 236 (2001); *Carib Inn Tennis Club & Casino*, 320 NLRB 1113, 1114 fn. 4 (1996), enf'd. 114 F.3d 1169 (1st Cir. 1997).

Accordingly, we shall deny the General Counsel's Motion for Partial Summary Judgment, and we shall order a hearing on the issues raised in the compliance specification.

#### ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 11 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning the issues raised in the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. April 16, 2004

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Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS

<sup>5</sup> Inasmuch as we deny the Motion for Partial Summary Judgment, we find it unnecessary to pass on Respondent Daufuskie's contention that it was prejudiced by the improper service of that motion.